



Wills and Estates

Information about Superannuation Death Benefits

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THE DISTRIBUTION OF SUPERANNUATION FUNDS UPON DEATH

The distribution of your superannuation benefits from your superannuation fund upon your death is not governed by your will. Rather, the trustee of your superannuation fund decides how your superannuation benefits are distributed, subject to the terms of the superannuation trust deed and relevant legislation. Only if the benefits are paid to your estate, or the legal personal representative of your estate, is your will relevant.

Superannuation benefits include existing pension entitlements, account balances and life insurance proceeds received by the fund.

BINDING DEATH BENEFIT NOMINATIONS

The only exception to the superannuation trustee's power to decide upon distribution is where a valid binding death benefit nomination has been made. A binding death benefit nomination should not be confused with a beneficiary nomination that is not binding. A binding death benefit nomination must comply with certain formal requirements, must be in favour of a dependant (discussed later) or the member's legal personal representative (i.e. the trustee of their estate) and must have been made no more than three years prior to the date of death. A non-binding nomination is merely the expression of a wish made without formal requirements and the trustee is not required to comply with it.

Although laws were introduced a few years ago to allow superannuation funds to offer members the option of a binding death benefit nomination, some industry superannuation funds do not offer this option to members. Most recently established self managed superannuation funds (SMSF's) will offer a binding death benefit nomination, although older ones may not. Also,

most retail funds offer a binding death benefit nomination option.

PAYMENT OF SUPERANNUATION DEATH BENEFITS

The form of the payment of superannuation on the death of a member and its tax treatment will be dependent upon to whom it is paid. The *Superannuation Industry (Supervision) Act* defines persons to whom a trustee can pay benefits, that is dependants, as a legal or de facto heterosexual spouse, a child of any age or someone who is financially dependent upon a member (SIS dependants). In contrast, the *Income Tax Assessment Act* defines dependants as being the legal or de facto heterosexual current or former spouse, a child under 18 years or someone who is financially dependent on the taxpayer (tax dependants).

The law currently requires that on the death of a member superannuation benefits be paid as follows:

1. **By lump sum to**
 - ▶ SIS dependants, therefore bypassing the estate and being unaffected by the will; or

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- ▶ The member's legal personal representative where, if the member has a valid will, the benefits received will be governed by the will, which could include a transfer to a superannuation benefit trust (as discussed below); or

2. By pension payments to SIS dependants

Under changes to the superannuation laws, from 1 July 2007 on the death of a member superannuation benefits must be paid as follows:

- ▶ To tax dependants by lump sum or pension (although a pension to a tax dependant child must be commuted to a lump sum once they turn 25).
- ▶ To the trustees of the member's estate or to a SIS dependant who is not tax dependant (i.e. children over 18 who are not dependant) by lump sum.

The superannuation trustee's options are also determined by the superannuation fund trust deed. Some self-managed superannuation fund deeds only allow payment to an estate if there are no surviving dependants and many do not offer death benefits in pension form. The trustee's options in the deed cannot go beyond the options set out in the law.

TAXATION AND SUPERANNUATION DEATH BENEFITS

From 1 July 2007, the taxation of benefits paid on the death of a member are:

1. A lump sum paid to a tax dependant will be tax free.
2. A lump sum paid to a non-dependant is subject to 16.5% tax on the taxable component (i.e. Taxable/concessional contributions and the fund's earnings) while the non-taxable component (undeducted/non-

concessional contributions) will be tax free.

3. A lump sum paid to the trustee of the member's estate will be subject to the same taxation treatment as if the payment had been received by the recipient directly from the trustees of the superannuation fund. For example, if the surviving spouse and adult child are to receive 50% each of the deceased's estate pursuant to the deceased's will, the 50% attributable to the spouse is tax free as it is paid to a tax dependant and the other 50% is taxable in accordance with the preceding paragraph.
4. Pensions paid to a tax dependant when either the deceased member or the tax dependant are aged 60 years or over are tax free. If both are under 60 the taxable component (see point 3 above) is taxed at the tax dependant's marginal tax rate less a 15% rebate until the tax dependant turns 60 when it is tax free.

A will maker must remember that the preferred distribution of superannuation death benefits may depend upon circumstances at the time. For example, it would be preferable to direct superannuation benefits to a tax dependant and give non superannuation assets to non-dependants. The will would then require an adjustment clause aimed at ensuring the total amounts paid to beneficiaries from the estate and superannuation and possibly also from a family trust are equal, if that is the will maker's intention.

SUPERANNUATION BENEFITS TRUSTS

Superannuation benefits trusts are trusts established solely for the benefit of dependants of a fund member and are funded by the member's superannuation benefits.

These trusts can be established either by a member's will (a superannuation benefits testamentary trust) or by deed after the death of a member (a superannuation benefits deed trust). They provide tax concessions to beneficiaries.

A superannuation benefits testamentary trust must be funded by superannuation death benefits that are paid to the member's estate. The will should contain provisions that effectively stream superannuation death benefits payable to the estate to such a testamentary superannuation trust, as opposed to a beneficiary testamentary trust from which distributions could be made to non-dependants.

By using a superannuation benefits testamentary trust the will maker can ensure that their surviving spouse retains full control over and access to the superannuation death benefits and access to income tax concessions. The surviving spouse also achieves protection of the assets in the trust.

IMPORTANT: A superannuation benefits testamentary trust should only be established, or payment to it made, where it is appropriate to pay the superannuation benefits to the member's estate. It should not be established, and payment of the benefits to the estate should be discouraged, if there are insolvency issues (i.e. the estate itself may be bankrupt) or there is a risk of a claim against the estate by a person believing he or she has been unfairly treated by the will.

If a will does not include a superannuation benefits testamentary trust or it is not appropriate to pay superannuation entitlements to a member's estate for reasons set out above, but there are tax dependants, a superannuation benefits deed trust

can be established after the will maker's death and before the trustee pays the superannuation entitlements.

A superannuation benefits deed trust must have the capital of the trust fixed for the benefit of tax dependants, as referred to above, to earn exempt income.

Payment of superannuation benefits to a superannuation benefits deed trust as opposed to payment to a surviving spouse will also protect the payment for the children of the deceased member from problems that may develop for the surviving spouse, such as insolvency or breakdown of a subsequent marriage or relationship.

IMPORTANT: This document is a guide only. It is not comprehensive legal advice. You should consult Harwood Andrews Lawyers about the distribution of superannuation benefits upon death.